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ABSTRACT

This paper focuses on the state of the law as it concerns adults with disabilities regarding educational issues. Sections 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 are addressed and legal issues are examined, including: (1) the definition of disability; (2) documentation of disability; (3) financial responsibility for documentation; (4) documentation for testing; (5) modifications of policies and procedures by testing entities and educational institutions; (6) eligibility criteria; (7) inquiries into disability; (8) privacy concerns; (9) program access; (10) communication issues; (11) affirmative action; (12) special programs for individuals with disabilities; (13) administrative requirements; and (14) enforcement issues. Special issues concerning learning disabilities and testing modifications are also addressed. Relevant court cases are examined in order to assess judicial interpretation of these issues. Two responses to the paper are attached and include information on the most common testing modifications that students' request. (Contains 49 references.) (CR)

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ED 461 191

THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973 AND THEIR APPLICATION TO EDUCATIONAL ISSUES

By Wendy Wilkinson * & Cynthia Dresden

I. Introduction

The passage of the Americans with Disabilities Act[1] in 1990 increased the level of debate and discussion concerning individuals with disabilities in the education arena. Central to the debate are issues of diagnosis, definition of disability under the ADA, and identification of appropriate modifications in testing procedures, admissions policies, and curricula. Although with passage of the ADA came intensified focus on these issues, many had been addressed under Section 504 of the Rehabilitation Act of 1973.[2] Section 504 applies to all educational institutions that receive federal financial assistance[3] and it provides similar language regarding definition of disability as was adopted in the ADA. Both 504 and Title II of the ADA require programmatic access and reasonable modifications in policies and procedures to provide access. Title II was drafted to incorporate the terminology and case law arising from 504. The interpretive guidance accompanying section 35.103, "Relationship to Other Laws," states that, "...Title II of the ADA essentially extends the anti-discrimination provisions embodied in 504 for federally assisted programs..." The ADA is also much more comprehensive and detailed than 504. Thus far, Title II of the ADA is being interpreted, for the most part, to be consistent with 504.[4]

The primary focus of this paper is on the state of the law concerning people with disabilities with regard to educational issues. Appropriate testing accommodations for individuals with learning disabilities will be analyzed. Both Section 504 and the ADA will be addressed as they pertain to the definition of disability, modifications of policies and procedures by testing entities and educational institutions, and related issues. Also examined will be relevant case law to assess judicial interpretation of these issues. It is important to understand the state of the law as interpreted in these areas because these are the cases that will have direct impact on the way that requests will be analyzed for testing entities and educational institutions making modifications for compliance with the ADA. For example, in order for individuals to receive necessary modifications in testing procedures, they will need to demonstrate that they are covered by the ADA. Therefore, understanding case law that has developed under 504 and the ADA around the definition of disability will be useful.

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Case law interpretation of what are considered "reasonable modifications" in testing procedures and in the classroom is also useful in understanding the "balancing" of rights and interests that courts have conducted in assessing whether a particular modification or accommodation must be provided.

We will also review Section 36.309 of the ADA which deals specifically with testing entities. Section 504 does not contain any comparable provisions which specifically address testing authorities.

When speaking of nondiscrimination and civil rights, it is impossible not to enter into some philosophical discussion of what equal access truly means. The boundaries of society's obligation to see that access is achieved is one factor. Understanding and implementing the policies to combat the discrimination the ADA and 504 were meant to remedy, one must come to terms with the long history of discrimination against people with disabilities in our society. As a society we must understand disability in order to successfully address discrimination because it often occurs without malice or forethought, it is simply the result of misunderstanding. Although this paper does not debate these issues directly, reference may be made to them.

II. Definition of Disability

To be entitled to the civil rights protection of the ADA, one must fall under the definition of disability specified in the Act. To be covered one must have:

> "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (b) a record of such an impairment; or
> (c) be regarded as having such an impairment." [5]

The definition of disability in 504 is essentially the same. To be covered under both 504 and the ADA, the impairment must rise to a level that substantially limits a major life activity. Not all individuals with impairments will be covered. Analysis and comments accompanying this section in 504 highlight the importance of proving a substantial limitation.

> "...It should be emphasized that a physical or mental impairment does not constitute a [disability] for the purposes of 504 unless its severity is such that it results in a substantial limitation of one or more major life activities." [7]

Major life activities include walking, seeing, and hearing. The appendix issued by the Equal Employment Opportunity Commission (EEOC) states that major life activities are those that "the average person in the general population can perform with little or no difficulty." [6]

The regulations accompanying both 504 and the ADA make it clear that individuals with specific learning disabilities may be covered.[8] For coverage under the ADA and 504 to be established, the learning disability must substantially limit one or more major life activities. For instance, both Attention Deficit Disorder (ADD) and learning disabilities (LD) can affect such major life activities as walking, seeing, hearing, speaking, and learning. An individual with LD that has difficulty reading would be covered, but an individual with an impairment which only affects their ability to organize notes from classes in the most efficient manner would not be covered. With reading, the difficulty must be caused by the disability. If it resulted from lack of access to education, the individual would not be covered.

Case law generated from both 504 and the ADA indicate the importance of establishing the existence of a disability. First, individuals must prove that they have an impairment which is substantially limiting and that the activity it limits is a major life activity. This first prong of the definition requires an individualized, functional analysis. It is clear from the case law generated by 504 and the ADA that it is up to the individuals to establish the existence of a substantially limiting impairment. If this first element is not established then the case will not proceed. In other words, if one does not establish coverage, "...it is unnecessary to address the question of reasonable accommodation." [9]

There is nothing in the ADA or 504 which would prohibit educational institutions from offering special programs for individuals with certain types of disabilities and establishing their own definitional criteria for admittance. However, the institution could not utilize its own definition of disability in the administration of any other programs subject to the ADA and 504. Also, just because an individual has been found to have a disability for the purposes of qualifying for a particular program does not mean that he or she would be entitled to ADA or 504 protection. Individuals must qualify under the definition of disability found in the ADA and 504 in order to assert their rights under these laws.

III. Documenting Disability

Neither Section 504 nor the ADA delineate what sort of documentation may be requested when documenting disability, nor is there much case law on this issue. As a general rule, any request for documentation should be reasonable and necessary. Section 36.309 of the ADA, **Examinations and Courses**, provides that "...requests for documentation must be reasonable and must be limited to the need for the modification or aid requested." Documentation should obviously come from someone with expertise in that particular area. Given current debate among experts regarding classification of learning disabilities and who is qualified to diagnose them, the question of documentation is particularly difficult in assessing and accommodating these
disabilities.

In *Pandazides v. Virginia Board of Education* [10] the individual bringing suit was not able to prove to the court's satisfaction the existence of a learning disability. In her initial request for accommodation to the state educational testing service (ETS), the plaintiff submitted letters from physicians and a doctor of education stating that she might have test anxiety. It appears their conclusions were drawn from observations made of the plaintiff in a classroom setting. Additional documentation was supplied after this initial request for accommodation was denied in the form of a report from a doctor who concluded that Ms. Pandazides had a learning disability.[11] After the documentation was supplied, the plaintiff was granted certain testing accommodations[12] although there was no ruling on the existence of a disability. Ms. Pandazides was given a series of tests by a psychologist after she failed the examination with the testing accommodations authorized by the testing authority. The psychologist diagnosed her with learning disabilities, testifying that she had auditory attention disorder, impaired integration of auditory and visual information, dysosmia, and expressive language disorder. He suggested additional modifications[13] which were denied. The federal district court ruled in favor of the defendant on the motion for summary judgment, finding that the requested modifications were unreasonable.

At trial the court gave great deference to the testimony of Dr. Barbara Knight Given, co-chair of the Southeast Regional Learning Styles Center and project director of the Learning Disabilities Certification Project for the United States Department of Education, who stated that her review of the documentation provided did not lead her to believe that the plaintiff had a learning disability. She stated that the documentation provided by Dr. Carter, the examining psychologist, did not specifically identify any of the learning disabilities listed in the *DSM-3R*. [14] Preliminary letters were also found not to be compelling, perhaps because the opinions were not the result of individualized testing.

The dicta in the case provides additional insight on other reasons the plaintiff's documentation was not accorded great weight. First of all, the initial letters were based on observation, not examination, and the exam administered was given by a "Dr. Edwin N. Carter, whose services plaintiff's attorney frequently uses in his law practice," as noted by the court. In this case it appears that the credentials of one expert had more weight than the opinion of someone who actually had tested the individual. Also key was the fact that the alleged learning disabilities were not directly identified in the *DSM-3R*, but were "hybrid categories he had pieced together." Finally, Dr. Given noted that the plaintiff's IQ test scores contradicted Dr. Carter's diagnosis of a learning disability. This case illustrates the importance of obtaining appropriate documentation from recognized sources, especially in the area of learning disabilities. As can be seen in this case, deference was given to the expert who had not examined the plaintiff. Documentation presented by the plaintiff was found to be inadequate. The documentation that may be required for individuals to prove they have a disability under

the ADA and 504 may also present tremendous hurdles for some because of the expense.

Documentation should also demonstrate that the requested accommodation is necessary to accommodate the individual's disability academically. For example, in a Letter of Findings recently issued by the Office of Civil Rights (OCR) of the Department of Education, in Cumberland Community College [15] an individual with documented memory and cognitive disabilities was denied a requested accommodation because the psychological evaluation did not demonstrate that it was necessary to accommodate the disability. The accommodation requested was weekly testing of class materials rather than mid- and end-of-term testing.

IV. Who Pays for Documentation?

There is no case law to date on the issue of who should pay for required documentation. The interpretive guidance accompanying section 36.309 of the ADA indicates that it may be the responsibility of the individual to pay:

> "...Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program. The applicant may be required to bear the cost of providing such documentation..."

The cost of obtaining this documentation may be prohibitive for some people. The cost of assessing an individual with learning disability, for instance, can be very expensive. In cases where a testing authority or a college accepts only one particular form of documentation or imposes a time limit on acceptance of existing record documentation and an individual has other documentation that could achieve the same purpose, it could be argued, probably not successfully, that these requirements effectively prohibit individuals with disabilities from taking the test.

V. Documentation for Testing

Testing authorities and educational institutions will generally have their own experts review requests for testing modifications and accompanying documentation. These "experts" may have a very narrow view of what constitutes a learning disability. Since these experts may not have actually seen the person for an evaluation, the individual should be able to provide documentation from experts that are acquainted with them and it could be argued that the findings of these experts should be given more weight. In cases where it comes down to a battle among experts regarding the diagnosis, the opinion of the treating expert should be accorded more weight. [16]

However, as we saw in the *Pandazides* case, a comparison of the credentials of testifying experts may be conducted and the opinion of the one with the more impressive background prevails. Some testing

authorities, such as GED, may specify in their testing policy manuals that deference be given to the professional acquainted with the individual. For instance, section 7.3-1.2 of the GED Manual "Test Administration Procedures for Adults with Disabilities," entitled "Appropriate Professionals," requires that the expert be "familiar with the candidate and be able to provide written verification that a special administration of the GED Tests is justified. The professional must have training appropriate to the diagnosis."

Providing additional documentation of a history of a disability, i.e., through copies of prior IEP's (individual education plans) or other existing records, may also be acceptable. For instance, Section 7.3-1.3 from the GED manual, provides that,

> "Schools, hospitals, the armed services, rehabilitation agencies, social service agencies, veterans medical centers and similar agencies may be able to document physical and emotional disabilities from existing records. If such records exist and the Chief Examiner is satisfied that the disabling condition is still present, no further diagnosis is needed. The agency must confirm the candidate's need in writing...to the Chief Examiner."

Acceptance of these records may be dependent on the type of disability involved. Is the disability "unchanging" or is there evidence that it may change over time? The examples that follow Section 7.3-1.3 allow existing record documentation and pertain to disabilities with "static" diagnosis and offer no real debate concerning their prognoses, such as with disabilities involving spinal cord injury, blindness, or cerebral palsy.

VI. Testing Issues

Section 504 requires that covered entities should not use "...any test or criterion...that has a disproportionate adverse effect on..." individuals with disabilities, except when "the test or criterion has been validated as a predictor of success in the education program or activity in question and... alternate tests that have a less disproportionate, adverse effect are not... available."[17] Throughout the rest of this paper when we speak of testing issues, the terms "modification" and "accommodation" will be used interchangeably. The statutory term is modification but when these issues are addressed, the term accommodation seems to be used more frequently and better conveys the concept we are addressing.

Title III of the ADA, which covers private entities, specifically prohibits discrimination by any private entity that "offers examinations or courses related to licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes..."[18] This provision was included to cover those entities not covered by 504 and other portions of the ADA. Under 504 most of these types of entities were not covered because they did not receive federal financial assistance, nor are they

covered by Title II of the ADA which applies to the programs and services offered by state and local governmental entities. Testing entities which receive federal funds or are covered by Title II of the ADA would be subject to the applicable nondiscrimination obligations of 504 or Title II. These obligations will be discussed in a later section of this paper.

The importance of this provision was made apparent during the rule making process when the DOJ received numerous comments on this section "reflecting the importance of ensuring that the key gateways to education and employment are open to individuals with disabilities."[19] This section requires that individuals with disabilities that impair "sensory, manual, or speaking skills" be given tests in a manner so that their abilities are tested. It asks testing entities to focus on ways to assess an individual's aptitude--to discern what factors the test is intended to measure and to allow modifications in the test itself so that these factors can be evaluated in a non- discriminatory manner. Specifically, Section 36.309 (I) requires:

> The examination is selected and administered so as best to assure that, when the examination is administered to an individual with a disability that impairs sensory manual or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those are the factors the examination purports to measure).

This section also mandates that an examination developed pursuant to this part be offered and administered as frequently as other examinations in locations that are "equally convenient." Facilities offering these examinations should be "accessible to individuals with disabilities" or the testing entity should make "alternative accessible arrangements." This section does not specifically require that these tests be offered at the same location as other tests as long as "alternative accessible arrangements" are allowed. So, testing entities have some flexibility here concerning location of test facilities. Many comments reflected concern about this provision because segregation is permitted. The language remained because the statute specifically authorizes "alternative" arrangements. The DOJ, in response, noted that most tests would be offered in facilities that would fall under one of the definitions of a "place of public accommodation" and would be subject to other nondiscrimination requirements of Title III--including integration. [20]

Both 504 and the ADA require that tests be administered in a non-discriminatory manner. Therefore, testing modifications must be made unless the institution or testing authority can show that the modification would fundamentally alter the test. Providing multiple choice examinations in different formats have not generally been modifications courts have found to be reasonable.

When tests are taken with accommodations, issues also arise concerning validity of the results. Often the testing authority flags the results which puts prospective educational institutions on notice that the applicant is a person with a disability. At this time, this practice is allowed under an interim policy issued by the Department of Education allowing educational institutions to accept flagged test scores, but requiring that other factors be considered in the admissions process. [21] In addition, applicants must be informed about accommodation policies and about any other criteria that are used in consideration for admission.

Educational institutions are required to offer modifications to individuals with disabilities so that they can take examinations. Multiple choice tests also cause the most controversy in this arena. *Wynne v. Tufts University School of Medicine* [22] outlined an educational institution's responsibility to provide testing accommodations. At issue was the administration of a multiple choice test to a medical student with a learning disability. The student claimed the administration of the test in this form was discriminatory. The defendant claimed this format was necessary because it required an important skill--the ability to quickly synthesize information. The medical school prevailed because it was able to demonstrate, to the court's satisfaction, that no reasonable alternative could be provided. The court found that even if the medical school "could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that additional accommodations were necessary."[23] In addition, the court found that Section 504 was not intended "to eliminate academic or professional requirements that measure proficiency in analyzing written information by attaining a passing score on a multiple choice test." Other cases have come to similar conclusions regarding tests which set baseline standards. In *United States v. South Carolina* [24] the court found that the state had "the right to adopt academic requirements and to use written achievement tests designed and validated to disclose the minimum amount of knowledge necessary to effective teaching."

Another testing modification that may be considered unreasonable is unlimited time to take a test. The Pandazides court noted that even if plaintiff had been found to have a disability under the Rehabilitation Act, she had "... failed to establish that the accommodations made by ETS, with the concurrence of defendants, were not directly responsive to the difficulties which the Plaintiff claimed as disabilities. Unlimited time would not be a reasonable accommodation because similar modifications could not be expected in the job of teaching." [25]

In order for an institution to show that it is not required to provide an accommodation, it must demonstrate that alternative means of testing were considered, that the alternative means were not feasible because of their cost and/or effect on the academic program, and that the alternatives would either lower academic standards or require substantial program alteration.

After passage of the ADA, during the rule making process, some testing authorities that offer certifications or licenses for particular occupations wanted to be given the right to refuse modifications or accommodations to individuals with disabilities which they believed would prevent them from carrying out the essential functions of the profession. The Department of Justice did not include this request in the rule and responded to it in the analysis accompanying this section asserting: "An examination is one stage of a licensing or certification process. An individual should not be barred from attempting to pass that stage of the process merely because he or she might be unable to meet other requirements of the process...the applicant may not be denied admission to the examination on the basis of doubts about his or her abilities to meet requirements the examination is not designed to test."[26] This requirement would not prohibit testing entities from requiring examinations that assess skills necessary for a particular profession. For instance, the court in *Pandazides* found that the State Board of Education's Communication Skills Test requirement was a "reasonable and legitimate professional licensing requirement" [27] for those individuals wishing to teach in public schools.

VII. Special Issues Concerning Learning Disabilities and Testing Modifications

Documenting the existence of an appropriate modification for an individual with a learning disability can be more difficult given that there is some controversy among experts concerning diagnosis and documentation. There is also debate over how recent the documentation must be. Some experts allege that in order for someone to establish that he or she currently has a learning disability, documentation should not date back more than three years. The justification is that learning disabilities are not static but may change over time. This can be a tremendous stumbling block because of the high cost of professional evaluations. If there is a great deal of evidence in existing records and documentation from a professional with appropriate expertise who is acquainted with the individual showing that the disability has not changed, then some deference should be accorded to the records. Section 7.8 of the GED manual, "Examples of Approved/Denied Requests for Special Testing" notes that GED examiners will give existing record document some weight but more will be required for substantiation.

> **Situation:** Ann Parker has dyslexia and has asked to be allowed to use the audio cassette version of the GED Tests. She has brought documentation of her situation by a neurologist who says she cannot ever learn to read normally. She attended 12 years of special education in this school district.
>
> **Request:** Audio cassette test and extended time limits.
>
> **Action:** Approved by the GED administrator and GEDTS.

Reason: Medical verification of a neurological problem and documentation of special need are provided. The fact that she had "Twelve years in special education," is supplementary information, but in itself does not constitute sufficient documentation.

The difficulty of demonstrating that the learning disability exists and is substantially limiting in order to trigger ADA and 504 coverage is also illustrated in the case law generated to date concerning these issues. For example, in *Tips v. The Regents of Texas Tech University* [28] the northern district court in Texas ruled that a student's inability to conceptually organize material on a doctoral comprehensive exam did not fall within the ADA's or 504's definition of disability because it was not perceived as a substantially limiting impairment. The court found that the plaintiff did not establish the existence of a disability to its satisfaction. There were other factors in the case that may have influenced the court's finding. One was the timing of the plaintiff's request for testing accommodations which were made after she had taken the test and failed a portion of it. In addition, there was no mention concerning what kind of proof, if any, was offered by the plaintiff to prove that she had the disability which she alleged required the accommodation requested. The plaintiff did have a documented learning disability which had been accommodated in a statistical course she had taken. This case illustrates the importance of establishing the nexus between the disability and the accommodation.

The special concerns that arise when identifying and accommodating learning disabilities is further evidenced in the GED manual on testing administration. Section 7.3-4, "Documentation of Learning Disabilities" provides detailed information on requirements for verifying "Specific Learning Disabilities." Generally speaking, depending on the particular modification requested, procedures for documenting physical and psychological disabilities is relatively simple and straightforward. For the most part, documentation from pre-existing medical records will suffice. Approval for the request may be obtained from the "state, provincial, or territorial GED Administrator" (Canada). "Because definitions of and procedures for verifying Specific Learning Disabilities (SLD) vary across the United States and Canada, approval of requests on the basis of SLD is required from the GED Testing Service" (7.3-4) itself. The requirements for SLD documentation are specific and detailed. A special form must be completed along with full documentation by a "professional who is trained and experienced in diagnosing SLD." Detailed information about the certifying individual's background with SLD and employment history is required and the manual specifies the minimal credentials one must have to be certified as an expert. Although the GED service does not specify how recent the documentation must be, the requirements outlined in "Documentation of the Condition" allude to a need for recent data and clearly require a reevaluation of data and records by a certified professional in order to provide all of the information required.

"The experienced certifying professional must state the nature of the disability and the method of diagnosis. Next, the certifying professional must indicate the data he or she collected to verify the SLD condition.

> **Clinical Interview**. A clinical interview must be conducted by the certifying professional to determine if the condition is long-standing. The examinee can indicate, for instance, that he or she has always had problems with symbols, whether they are words, mathematical figures, or musical notations. In the case of a head injury or arrested substance abuse, included in the category of SLD, the examinee will have the opportunity to describe relevant trauma and/or treatment."

Information on the testing protocols used in making the diagnosis is also required. In addition, the GED manual specifies the degree of discrepancy (at least one standard deviation) that must be demonstrated in the test results for certification of the SLD.

> Finally,
>
> The form concludes with the steps taken in the candidate's past schooling to offset the effects of the SLD condition. These might include Adult Basic Education classes with accommodations, specialized instruction, or even comments on the candidate's drive and determination. The results of these efforts must also be clearly stated. The certifying professional is expected to evaluate whether the candidate has the academic skills needed to pass the tests .

The ADA and 504 do allow inquiry to be made into the existence of a disability. However, the scope of what is requested should be limited to what is necessary for the purpose of making modifications in testing policies and procedures to assure nondiscrimination. Additional, unnecessary inquiries should not be made.

VIII. Eligibility Criteria

> Section 35.130 (8) of the ADA provides:
>
> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program or activity being offered."

This section could be used to challenge requests for documentation of disability and other inquiries that go beyond what is needed to establish the existence of a disability or the necessity for a particular accommodation. For instance, the section excerpted from the GED manual on documentation which states that the professional should evaluate an individual's academic

ability to take the test could be challenged as it presents an additional barrier for people with disability that others are not required to scale. It could also be argued that this inquiry goes beyond the scope of what is necessary for the purposes of determining the appropriate testing accommodation.

Section 504 and the ADA prohibit imposition of eligibility requirements that screen out or tend to screen out individuals with disabilities. Therefore, any requirement that may impact the eligibility of an individual with a disability for a program should be scrutinized carefully. In the case of validating a test accommodation, inquiry should be limited to what is necessary in order to link the accommodation to the disability. This particular inquiry in the GED manual appears discriminatory on its face because it does not seem to be necessary for evaluating a modification request. In addition, no other individuals taking the test are asked to submit professional evaluation of their academic ability to succeed on the test.

The ADA and 504 do not prohibit imposition of particular criteria for participation in particular academic programs. These laws were not intended to interfere with legitimate academic requirements. There may be some programs which may not permit participation by individuals with certain types of disabilities because of the nature of the program. When an individual with a disability or a class of people with disabilities are, in effect, screened out from participation because of particular academic criteria, then these criteria should be carefully scrutinized. Inquiry should be made into possibilities for modification or, if that is not possible, substitution. When such inquiry is made, one should look carefully at the "route" someone needs to travel to become certified or obtain a degree. What is the body of knowledge that needs to be assimilated? How important is it that the knowledge is imparted and then tested in a particular fashion? It might be useful to look at professions that historically have been closed to people with disabilities because of myths and stereotypes about what they could not do and see what programmatic changes were made to include people with disabilities.

The passage of Section 504 forced many academic institutions to review testing and program requirements and to open their doors to people with disabilities. Many of these challenges have ended up in court. When particular requirements are challenged, courts look at how essential they are to a program--would the program be fundamentally altered if they were modified or eliminated, for instance. Courts have shown some deference to academic criteria. If the waiver of a requirement would cause a fundamental alteration in the program, then it would not have to be waived.

Things that appear neutral, such as requirements for minimal grades on a test and a certain GPA, may be subject to challenge if the requirement is absolute. Such blanket prohibitions violate both 504 and the ADA. Under

504 academic adjustments must be made to assure nondiscrimination. Thus, "Modifications may include substitution of specific courses required for the completion of degree requirements..." [29] Consideration should also be given to special circumstances where indications are that a person with a disability scored badly on an examination because of his or her disability. Perhaps he or she was not accommodated or the accommodation granted was ineffective. If there are no exceptions granted, classes of individuals with disabilities could be screened out even if they could demonstrate that they truly are *otherwise qualified*. Because individuals with learning disabilities have difficulty processing language, math and foreign language courses often pose great difficulty. Foreign language course requirements should be waived where they are not necessary to the academic program the student is enrolled in. Such exemptions for foreign language requirements are granted on a regular basis for individuals with learning disabilities in many colleges and universities. Exempting students from mathematical requirements is much more difficult because of they are often essential requirements of many programs. Recent administrative rulings issued by OCR concerning waiver of mathematical requirements illustrate the difficulty of getting these requirements waived. OCR looked at the programs the students were pursuing and deemed that math was an essential requirement in most instances. [30] If the educational institution can prove that math is an essential program requirement then it does not have to waive it. A case that was filed in July, *Guckenberger v. Boston University* [31], may help clarify these and many other educational issues centering around individuals with learning disabilities. In *Guckenberger*, Boston University was sued after instituting new, rigid disability accommodation policies--such as requiring diagnostic evaluations every three years for individuals with learning disabilities, prohibiting exemptions from foreign language courses, and making the procedure for requesting modifications overly bureaucratic and burdensome.

IX. Inquiries into Disability

Inquiries into disability are generally prohibited before admission to an educational program except in cases where incoming students state that they have a disability and may need assistance in the application process or are requesting programmatic accommodations. When this occurs, inquiries should remain focused on eliciting only information relevant to determining what modifications are needed. Remember, the ADA provides civil rights protection for people with disabilities as defined in the Act so that when someone brings up the need for a modification and the disability is not obvious, then documentation may be requested. Keep in mind that since the accommodation should be what is necessary as a result of the disability, documentation may be necessary to establish this link even when the disability is obvious, but not clearly connected to the modification required. Individuals with disabilities are only entitled to modifications that are necessary to assure program access, so there may also be a need to differentiate between what is necessary and what is desired. Some deference should be given to the individual's preferred modification, but an

educational institution is not required to provide the best technology, for instance, that is available. The test is whether the accommodation provided is sufficient to assure nondiscrimination.

Entities covered by Title II of the ADA and 504 do have a duty to take steps to inform applicants and students of their rights under these laws and to make available information about relevant policies and procedures. However, it is up to the individuals with a disability to alert the educational institution that they need an accommodation. If a school is unaware that an individual has a disability, it will be difficult to prove that it has discriminated against the individual. However, if there is some action on the part of the student that could be construed as putting the institution on "notice" that a disability may exist, it may be incumbent on the school to inform the individual of his or her rights under the ADA and 504. For example, in *Nathanson v. Medical College* [32] a medical student with a record of a back impairment made a request for special seating. This was found to put the institution on "notice" that a disability may exist.

Disability-related inquiries may also be made for the purpose of administering special programs designed for individuals with disabilities. This is further discussed in Section XVI.

X. Privacy Concerns

Under the ADA and 504 information about disability should only be released on a need-to-know basis. Only those persons with some responsibility for assuring that a modification is made, for example, should be informed. It could be a violation of the ADA and 504 to release disability-related information to others which may be contained in a student record.

XI. Otherwise Qualified

Section 504 provides that no "otherwise qualified individual with [disabilities] shall, solely by reason of his [disability] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any federal program. Under Section 504 persons are "otherwise qualified" if they "meet the academic and technical standards requisite to admission or participation in the recipient's program or activity." [33]

Section 35.104 of the ADA defines a *Qualified individual with a disability* as, "...an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

The precedent setting case outlining the definition of otherwise qualified is *Southeastern Community College v. Davis.* [34] In *Davis*, the Supreme Court

found that an otherwise qualified individual with a disability is one who can "meet all of the program requirements in spite of" his or her disability. At issue was the admission of an individual with a hearing impairment into a nursing program. The court felt that the individual's inability to understand speech without relying on lip-reading made her unqualified. The only way she would have been able to participate in the clinical phase of the program was with individual supervision. Elimination of the clinical portion would have fundamentally altered the program. The *otherwise qualified* definition which appears in the ADA arguably incorporates this standard as in *Davis* the ability to participate in the clinical program was deemed to be essential. Evaluation was made into whether modifying or accommodating this portion of the program was reasonable. The court came to the conclusion that it was unreasonable as it would result in a fundamental alteration to the program. So, under both *Davis* and the ADA an educational institution would need to evaluate the consequences of eliminating or modifying requirements to determine whether the program would be fundamentally altered in doing so.

In order to determine whether an applicant is *otherwise qualified*, an educational institution should first determine whether the individual falls within the definition of disability under the ADA and 504. Next, essential program requirements should be identified and an evaluation conducted to determine "the extent to which reasonable accommodations that will satisfy the legitimate interests of both the school and the student are available." [35] Reasonable accommodation can include elimination of a program requirement. Finally, the institution should consider whether the accommodation will fundamentally alter the program.

The extent to which an institution has searched for possible accommodations will also be important. The court in *Wynne* formulated a test for determining whether an academic institution performed an adequate search for possible accommodations:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result in either lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

XII. Testing Modification Procedures

Testing modification policies for people with disabilities should be made easily accessible. Again, any disability inquiry made or documentation requested should be strictly tailored to eliciting information necessary for determining ADA or 504 coverage and appropriate testing modifications. Information about the review and appeal process should be included as well. Timeliness concerning notification that a requested modification was

accepted or denied should be designed to allow time for an appeal since timing can be crucial if the request is denied and the test is imminent. Inability to take a test on a certain date may cause an individual to delay or lose job and educational opportunities.

In *Glass v. New York State Board of Bar Examiners*[37] the attorneys representing a bar applicant were able to obtain a temporary restraining order so that the individual could take the bar examination while the issue was being settled. It was argued that irreparable harm would occur if the individual was delayed in taking the examination. The motion succeeded because the attorneys successfully argued that a delay between the time when an individual graduates law school and when he or she is admitted to the bar would be apparent on a resume and could present a great stumbling block when it came to obtaining employment. Testimony was presented by legal search firm personnel to the effect that gaps in resumes can present tremendous problems for job-seekers, "... gaps' in resumes are one of the most important things I look for ...a break between law school graduation and admission to the bar is one of the first items I explore...because it indicates a failure to have passed the bar the first time out...which can indicate...lesser competence." [38]
Similar argument can be made in other venues that delay in taking examinations can result in irreparable harm to educational and employment opportunities.

The accommodation requested in *Glass* was extra time to take the exam because of a learning disability. The individual was allowed to take the exam pending the outcome of the case. Since the outcome was uncertain, the individual wrote the answers completed within the regular allotted time with one color ink and used another color for the part of the exam completed in the extra time. This way, if the appeal failed, the individual could still be graded on the portion finished within the regular allotted time.

It may be a good practice for testing authorities to have such a policy in place so that the individual with a disability will not be irreparably "harmed" if the appeal prevails. In *Re: Cahill*,[39] another case dealing with the denial of a requested accommodation, a court in Delaware found that a hearing should have been held to determine whether the requested accommodation to take the bar examination was reasonable. The Board of Bar Examiners was ordered to utilize the same hearing procedure used when issues arise concerning an applicant's "character and fitness" to practice law.

XIII. Program Access

Section 35.130 (7) of Title II of the ADA requires that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the program, service or activity."

Modifications should be made as long as they are reasonable. If basic requirements can be met by reasonable adaptation or modification, then they should be met. If a requirement cannot be reasonably adapted then it may not have to be altered. With regard to alterations in an academic program, the Davis case also provides some guidance. The Supreme Court found that Section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate" a person with a disability.

XIV. Communication Issues

Many issues in testing situations and in the classroom have arisen around the obligation to provide "effective communication." The ADA and 504 require that individuals with communication impairments be provided with auxiliary aids and services to ensure effective communication. Section 36.309 (iii) (3) which addresses the requirements for testing entities specifies:

> A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can document that offering a particular aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden. Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.

The type of auxiliary aid or service provided will depend on the needs of the individual. Whatever is provided must be "effective."

The cost of any auxiliary aid or service provided is the responsibility of the testing authority or the institution. No charge of any kind can be passed on to the individual. In an educational setting, the responsibility and cost of providing interpreters has been the issue of some litigation. The issue has centered around which entity, the college or the vocational rehabilitation agency, has the primary responsibility for paying for interpreters used by students. The two major cases that were brought under 504 found that state vocational rehabilitation agencies were primarily responsible. [40] Where a student was not eligible for vocational rehabilitation services, a college could require that the student seek state or private funding, but if no other resources were available then the college would have to pay. No financial needs test should be utilized. [41]

It is important to remember that these cases came down under 504. Since passage of the ADA, this issue has surfaced more frequently as vocational rehabilitation agencies under the ADA are asserting that colleges should assume primary responsibility. There have also been policy letters issued by the regulating agencies which indicate that they may view the allocation of responsibility differently. A recent policy letter issued by the Department of Justice to the OCR stated that schools should not require students to seek outside funding regardless of whether there is a financial means test imposed by the state rehabilitation agency. The DOJ stated that "requiring completion of the application process imposes a burden on students with disabilities that is not imposed on other students." [42]

Even if the college is not paying for an interpreter, it should assure that the student is receiving the appropriate service. Although neither the ADA or 504 directly address this issue, it is clear that this is the least nondiscrimination requires. In addition, assuring appropriate provision of services is probably within the realm of administrative responsibilities of ADA and 504 coordinators. This will include provision of auxiliary aids and services for whatever is required to access the class. For instance, readers should be provided for assigned reading. This obligation probably does not extend to things like tutoring unless the college sponsors tutoring services for others.

Under both 504 and the ADA the obligation to provide access to testing and educational opportunities extends to the point that an "undue financial or administrative burden is imposed." Three factors must be considered in this evaluation--the nature and cost of the action, the overall financial resources available to the program, and the impact of providing the aid or service on the program.
It is important to keep in mind that accommodation issues other than simply providing an interpreter for spoken English may need to be explored when dealing with individuals who are deaf. Most individuals who are deaf use American Sign Language (ASL). It is an abstract language, very different from English. As a result, many individuals who are deaf have difficulty understanding standard written English, so it may be necessary to provide interpreters for written examinations as well.

XV. Affirmative Action

Neither the ADA nor 504 of the Rehabilitation Act require affirmative action. There has been some confusion over this issue. Section 501 and 503 of the Rehabilitation Act, which apply respectively to federal government employers and government contractors, do require affirmative action. Under section 503, affirmative action requirements apply to those contractors who receive more than $50,000 annually or employ more than 50 individuals. The Americans with Disabilities Act simply prohibits discrimination. Although 504 does not mandate affirmative action, it does require recipients of federal financial assistance to conduct self-evaluations to determine whether discrimination has occurred in the past. If there is evidence of a

history of discrimination, then the institution must develop and implement a plan to remedy this history.

If an institution is making inquiries in order to implement a remedial plan, it should make it clear that the information is being requested for remedial reasons, that a response is not mandatory, that the information will be kept confidential, and that no sanctions will be imposed for not answering.

In *Davis*, the Supreme Court spent some time discussing the difference between nondiscrimination and affirmative action, noting that the meaning of each and where one begins and the other ends can be subject to some debate. Making modifications and providing accommodations does necessitate some action. Key here is how substantial the action must be. In*Davis* the court found that the requested modification was not reasonable.

XVI. Special Programs

Although not required by the ADA or 504, colleges and universities may provide special programs for individuals with disabilities. If special programs are provided and an individual wants to apply for services beyond what is required under the ADA and 504, it would not be a violation of these Acts to ask questions about disability for the purposes of evaluating whether these individuals qualify for the program. Students' participation must be voluntary. Students with disabilities must not be forced to participate in a special program even if they qualify for its services.

A case which analyzes the responsibilities of an educational institution in providing special programs is *Halasz v. University of New England.* [43] In *Halasz* a student with Tourette's Syndrome and learning disabilities brought action against the University of New England alleging that he had been illegally dismissed by the university in violation of 504. At issue was the student's dismissal from the schools First Year Option program (FYO). FYO was designed for individuals with learning disabilities who did not have the academic credentials necessary for admission to the degreed program. It allowed these individuals to take one or two degreed courses in a transition period while they received all of the supportive services available through another special program for individuals with learning disabilities called the Individual Learning Program (ILP). Services available through ILP included diagnostic testing and counseling by a specialist in learning disabilities. The student was not qualified for the regular university program and was accepted into the FYO. At the end of his second semester he received a 1.375 grade point average--too low for entry into the regular program and the student was dismissed.

The court did not find a 504 violation. The student had alleged that the college violated 504 in many of its practices. Among the allegations was a challenge to the practice of assessing fees on students in ILP and FYO for services provided exclusively to them. The plaintiff charged that the school

was forcing him to pay for his reasonable accommodations. The court responded by stating that, "Section 504's protections against discrimination on account of [disability] are afforded only to individuals who, except for their [disabilities] are otherwise qualified for the benefit to which they seek access."[44] A recent administrative ruling issued by the Office of Civil Rights (OCR) in response to a similar challenge by a student concerning fees charged for services provided for an individual with a learning disability supports the court's finding on this issue. In *Monmouth University* [45] the OCR found that the school was providing services required under 504 at no cost so there was no 504 violation. Fees were charged for additional, enhanced services for such things as counseling and tutoring to students with learning disabilities.

XVI. Administrative Requirements

Both 504 [46] and the ADA require that an educational institution notify applicants and students of its nondiscrimination obligations under both laws. The nondiscrimination statement should comply with all of the procedural requirements of Section 504 and the ADA. A coordinator should be designated who will assure compliance with both laws. This information should be included in application packets and student handbooks. Not providing the coordinator's name could be a technical violation of 504 as well.[47] Procedures should be in place so schools can respond in a timely manner to requests for auxiliary aids, services, and academic adjustments. These procedures should be in writing and should contain specific information on criteria for determining disability and for the process for appealing denial of accommodation requests. As time is generally of the essence, prompt notice, particularly concerning denial of accommodation requests, should be given. Students with disabilities should be informed of what services are available and where they should go to obtain them.

XVII. Enforcement Issues

The numbers of complaints against educational institutions alleging disability discrimination continues to rise. Students with disabilities are becoming more sophisticated in their level of knowledge concerning their legal and civil rights under the ADA and Section 504 of the Rehabilitation Act. It is extremely important that educational institutions likewise understand their responsibilities and have policies in place to respond to the questions and requests of students with disabilities.[48] Many colleges and universities have got into trouble because they did not had legally sufficient written policies and procedures in place to coordinate and implement ADA and 504. According to OCR, the largest number of complaints have centered around the issues of accessibility, provision of auxiliary aids and services, and testing modifications.[49]

Endnotes

1. Pub L No 101-336, 104 Stat 327 (1990)

2. 29 U.S.C. Sect. 701-796

3. The Civil Rights Restoration Act of 1987 amended to say that the receipt of federal financial assistance in one program triggers 504 coverage for the entire entity. There have been a number of cases that have defined what federal financial assistance is. The funding must be received not through alternate channels.

4. Sec. 204 (b). Regulations mandated that ADA regulations dealing with "program accessibility, existing facilities," and "communications" to be drafted to be consistent with 504. 42 USC 12134.

5. 42 U.S.C. 12102, Sect. 3 (2)

6. 42 Fed. Reg. 22685, May. 1977

7. 29 C.F.R. Part 1630.2 (i)

8. see 34 CFR Ch. 1 Sect. 104.3(j)(2)(I) and 29 CFR Part 1630.

9. Jasany v. United States Postal Service 755 F.2d 1244, 1249-1250 (6th Cir. 1985)

10. Pandazides v. Virginia Board of Education, 804 F. Supp. 794 (E.D. Va 1992)

11. " Ms. Pandazides is learning disabled. Auditory processing is the specific skill which is most troublesome for her. The pattern of her scoring and achievement support this conclusion. In addition, she is sensitive to the stresses involved in being tested and is thus operating under an additional burden when evaluated in a grouped, timed situation. If provisions are made to this type of testing, this young woman qualifies. Insofar as her ability to teach special education youngsters, Ms. Pandazides has demonstrated her excellent ability to master the academics involved and is in an unusually good position to understand and empathize with special needs at 798.

12. Ms. Pandazides was given 50% more time to take the exam, a script of the audio portion of the exam, a tape player so she could play and listen to the audio section at her own speed, a regular print copy of the examination and the opportunity to take the exam in a separate room.

13. The testing psychologist, Dr. Carter, concluded, "Plaintiff has learning disabilities associated with auditory attention, the integration of auditory-visual information and expressive language." He also recommended that additional testing modifications be allowed. These modifications included

untimed tests, and interaction between the examiner and the test taker which included the opportunity for the plaintiff to talk about her answers with the examiner.

14. Nationally recognized directory of mental illnesses.

15. 6 NDLR 418, Cumberland County College

16. *D' Amico v. NYS Bd. Of Laws Examiners* (W. D. N. Y. 1993)

17. 34 CFR Sect. 104. 42 (b)(2)

18. 42 U.S.C. 12189 * 309

19. 36.309

20. 36.203

21. Rothstien, Laura, Disabilities and the Law, p. 198

22. Wynne v. Tufts University School of Medicine 932 F2d 19(1st Cir. 1991)

23. id.

24. United States v. South Carolina 445 F. Supp. 1904, 1107-1108 (D. S. C. 1977), affd. Mem 434 U.S. 1026, 98 s. Ct. 756, 54 L. 2d 775 vacated on other grounds, 425 F. Supp. 789 (E.D. N. C.

25 Pandazides at 803

26. Section 36.309 Analysis

27. Pandazides at 803

28. 8 NDLR

29. 34 C. F. R. Sect 104.44 (a)

30. 7 NDLR 26, Bennett College

31. Guckenberger v. Boston University (U.S. District Court of Mass.) From National Disability Law Reporter vol. 8., issue 9 (1996), p. 8

32. Nathanson v. Medical College, 926 F2d 1368

33 34 CFR 104

34. Southeastern Community College v. Davis 442 U.S. 397

35. Wynne at 24

36. Wynne at 26

37. Glass v, New York State Board of Bar Examiners, N. D. N. Y. Settlement March 1996, 8 NDLR

38. "Attorneys Devise Strategy to Convince Judge of Irreparable Harm," *National Disability Law Reporter*, Vol.8, Issue # 4, p.5. Testimony of Jonathan E. Grades.

39. In. Re: Cahill 8 NDLR179, No. 81996 (Del. 1996)

40. Jones v. State of Illinois 689 F2d 740, 11th Circuit.

41. United States v. Board of Trustees, 908 F2d 740, 11th Circuit

42. National Disability Law Reporter, vol. 7, issue 14, p. 16

43. Halasz v. University of New England, 816 F Supp 37 (D. Mass.)

44. Halasz at 44

45. National Disability Law Reporter, Vol. 8, Issue 7, p. 20.

46. Section 504 states that "appropriate initial and continuing steps" should be taken to notify applicants and students that it does not discriminate on the basis of ..." disability" in violation of section 504. Included in this notice should be an identification of the responsible employee designated pursuant to Sect. 104.-7(a). CFR Sect. 104.8

47. Halasz v. University of New England 816 F. Supp. 37

48. National Disability Law Reporter, Vol., issue 14, p.4

49. *Id* at 5

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THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973 AS THEY APPLY TO EDUCATIONAL ISSUES

Response by Karen Liersch

I. What is My Perspective on This Paper?

Generally, this paper is accurate in its presentation of ADA and Section 504 requirements as they relate to programs such as adult education. The emphasis on taking those steps which are necessary to avoid discrimination is good and strengthened by the discussion regarding neither law being an affirmative action statute.

I would recommend a more in-depth analysis of the tests involved in the definition of a disability which is the same under both 504 and ADA. For example, a discussion on what each of the highlight phrases means would be of value to those charged with determining whether a person meets the definition:

Questions:

1. Does the person have a physical or mental impairment?
2. Does the impairment substantially limit one or more major life activities? (especially learning as such an activity relates most closely with adult education)
3. Does the person have a record of such an impairment?
4. Is the person regarded as having an impairment?

It may be helpful to administrators of programs to know that they need to conduct a self assessment under both laws and that having a self assessment and implementation plan weighs heavily with courts and enforcement agencies, such as DOJ or OCR. The self assessment was briefly mentioned in the paper. I would simply recommend additional emphasis in this area so people do not overlook its importance.

II. Discuss Experiences with Accommodations in Your State with Respect to Costs and Who Paid Them

In Arizona, accommodations in programs and testing are borne by the program or testing center. Documentation of a disability for determining whether a person meets the definition of a person with a disability is generally the responsibility of the individual. If additional programmatic testing is required in order to accommodate the students' needs, such testing is the responsibility of the program, as are any associated costs.

III. Do You Have Any Insights into Testing Modifications That You Can Share with the Panel?

The most common modifications requested by students include the following:

a. Extra time. The maximum time authorized in Arizona has been double the usual testing time. The Chief Examiner has required pretest and posttest documentation, after instruction, as documentation that this amount of time is necessary and appropriate.
b. Private room.
c. Scribe or similar accommodation, such as the use of a stylus/computer combination, for persons with physical disabilities.

These are all common accommodations and other, more specialized, accommodations are available upon request. One of the recommendations made by our State Chief Examiner is that a study be conducted regarding the effectiveness of the accommodations. Perhaps a quantitative study, based on performance, combined with a satisfaction survey which reflects the student's perception of effectiveness.

IV. Other Issues

a. Many students and advocates do not understand the purpose of the GED and rely on it as an alternative high school diploma when it may not be appropriate for certain students. In fact, we are encouraging our state to develop several alternative diploma options which may be more relevant to meeting individual needs. One of the principal difficulties has been the protection of the integrity of the GED tests when students and advocates often see it as merely a piece of paper which allows students to obtain or retain employment or seek entry into military service.

b. The range of accommodations being requested is expanding. This requires constant training of staff, including familiarization with community resources and expanding staff awareness of the technological capacity available.

c. Training on GEDTS requirements for testing is an ongoing issue. It is important to provide continual training in this area, as examiners need to understand the contractual obligations of the parties and the need to comply with those terms. In addition, such training will assist staff in maintaining the integrity of the tests and avoiding situations where requests for testing accommodations are no longer reasonable

d. Confidentiality issues. This may be assisted by preparation of a standard release form which allows the Chief Examiner to obtain information essential to determining whether the person meets the statutory definition of a disability and what reasonable accommodations are to be provided.

e. Funding. Since neither ADA nor Section 504 provides funding for accommodations, programs and testing centers often have difficulty paying for requested accommodations. While individual accommodations are not necessarily expensive, the cumulative effect can be significant, particularly when individualized testing is requested or a contractor refuses to test one student when s/he could be testing 20 and receiving significantly more money for the same amount of testing time. Also, the time spent evaluating requests for accommodations for students who do not meet the definition of a person with a disability can also be significant.

THE AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT OF 1973 AS THEY APPLY TO EDUCATION ISSUES.

Response by James S. Lindberg

Regardless of the definition of disability as contained in Section 504 of the Rehabilitation Act of 1973 and the more recent Americans with Disabilities Act, the most important concept of these two federal laws is the requirement for programmatic access and the reasonable modifications which school districts must provide for adult students. The paper we are reviewing does an excellent job in analyzing appropriate testing accommodations for individuals with learning disabilities and makes some good suggestions for instructional programs.

Ms. Wilkinson identifies one of the critical issues in documenting disabilities, in particular, the area of "learning disabilities." She points out that there is "debate among experts as to what is a learning disability and who is qualified to diagnose them." It should also be recognized that in some instances the diagnosis of learning disabilities may in itself be encouraged because of economic factors such as the additional funding that the diagnosis will bring to the program. In most cases, the adaptation of curriculum and instruction can be made for students even when particular learning disabilities have not been diagnosed. We have found that too much time is often wasted on diagnostic issues that could be better spent on providing ways for classroom teachers to modify and adapt their instruction so that all learners will receive greater benefit.

In examining the provisions of both Section 504 and the ADA, it is in the area of access to instruction and reasonable accommodations that California Department of Education receives more requests for assistance. As Ms. Wilkinson points out in Section IX, Inquiries into Disability, "inquiries should remain focused on eliciting only information relevant to determining what modifications are needed." Where school districts get into trouble is allowing someone who does not represent their interest to tell them what they must do to accommodate. Ms. Wilkinson makes the strong point that "Individuals with disabilities are entitled to those modifications that are necessary to assure program access so there may also be a need to differentiate between what is necessary and what is desired."

For example, in an open entry, open exit GED preparation class which is delivered through individualized instruction and not classroom lecture, a hearing impaired student may not need to have a full-time interpreter. Other types of instructional assistance using written communication could be applied when appropriate. Ms. Wilkinson recognizes this, but she also points out that it is still the responsibility of the institution to assure that the student is receiving the appropriate service.

In the case of a vision impaired student, the same principles apply. There may be times when it would be necessary to have a reader assigned to assist the student, especially when materials are not available in Braille or in large print, but this obligation "does not expend to the point that an undue financial or administrative burden is imposed." In providing appropriate services which may be expensive, coordination and planning may be effective in eliminating unnecessary and wasteful practices.

In any case, the type of modification may vary from situation to situation and what is appropriate for one student with a particular disability is not always appropriate for another student with that same type of disability. Ms. Wilkinson gives us an excellent measuring stick to evaluate all of our efforts to accommodate students within the intent of the law. As she states so concisely, "the accommodation is effective in assuring nondiscrimination." To paraphrase a line from the *Mikado* by Gilbert and Sullivan- "Let the accommodation fit the situation."

At this point in time, there have been enough studies conducted and a sufficient amount of successful interventions or instructional models developed allowing us to proceed in providing multi-sensory, targeted instructional strategies and other proven interventions for adults with special learning needs.